IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 22.12.2004

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

Criminal Revision Case No.1513 of 2004
and
Criminal Miscellaneous Petition No.9417 of 2004

Mrs.Bindiya Hillary Mehra ... Petitioner

Vs.

1. Dipak R. Mehra
2. Mrs. M.R.Girija ... Respondents

Revision Case filed under Sections 397 and 401 of Cr.P.C. seeking relief as stated.

For Petitioner : Mr.N.D.Bahety
For respondents : Mr.Joseph
for M/s.Surana and Surana

O R D E R

The above Criminal Revision has been filed by the petitioner praying to set aside the order dated 1.7.2004 passed in C.C.No.8219 of 2001 by the X Metropolitan Magistrate, Egmore, Chennai by calling for and examining the said records.

2. Today when the matter is taken up for consideration in the presence of the learned counsel for the petitioner as well as the learned counsel for the respondents, what comes to be known is that the complainant/petitioner herein lodged a private complaint against the respondents, which was taken on file as C.C.No.8219 of 2001 by the Court below for the offence under Section 494 IPC read with Section 200 Cr.P.C. and that during pendency of the trial, the Court below passed the following order:

> "Complainant present. A.1 and A.2 present. Forensic Department has asked for specimen signature of Jeyashree Sethi (PW.2). Hence Jeyashree Sethi to be present before Court on 5.8.2004 to make specimen signature before Court and also counsel for accused to take process for the same through Court, with instructions to bring documents relating to the year 1996. Call on

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5.8.04."

3. Aggrieved by the said order, the revision petitioner has come forward to file the above revision seeking to set aside the said order on grounds such as that though the respondent has been consistently praying for PW.2 to be summoned before the Court for giving her exemplar signature, the same has not been granted by this Court in Crl.R.C.No.784 of 2003 vide its order dated 25.7.2003 and that the Court below itself has dismissed the memo dated 13.2.2004 on 3.3.2004; that Crl.R.C.No.724 of 2004 filed by the respondent was dismissed; that finally again the Court below allowed Crl.M.P.No.194 of 2004 filed to advance the hearing for sending the said two documents for forensic opinion; that the lower Court grossly erred and acted in abuse and excess of jurisdiction in ignoring, refusing and even brushing aside the petitioner's personal request during the Advocates' Boycott on 1.7.2004 to even look into, much less consider, the earlier orders passed regarding the very same matter both by this Court as well as the earlier Presiding Officer of the Court and even refusing to permit the petitioner to file her objections and/or even give her an opportunity for her counsel to be in a position to represent in the matter before the Court; that it was not the stage for the identification of the person/s who signed Ex.C.3 and Ex.D.1 but whether the two signatures could be said to be of one and the same person and not necessarily PW.2; that even CW.1 - Hotel Anand Regency through whom Ex.C-3 had been marked had categorically deposed his inability to state whether the occupant under Ex.C.3 was a male or a female etc., and as such no pre-set assumption could even be made that Ex.C-3 was related to PW.2; that this Court had declined to give the subjective and objective relief of co-relating Ex.C-3 and Ex.D-1 and with PW-2; that the only purpose of the Forensic Authorities was to give their opinion as to whether the signatures on Ex.C-3 and Ex.D.1 were by one and the same person and it was not in their purview to identify any person/s related with the said two documents as presupposed by them as that of PW.2; that even in the request letter dated 31.5.2004 of the Forensic Authorities, nothing had even been whispered as to, how, why and in what matter, were the said Authorities unable to submit and give an opinion as directed by the Court, which was mandatorily required to be made clear before seeking further information and details; that the petitions filed by the petitioner to set aside the said order as well as to stay the operation of the same till then, on the ground to explain as to how the same were maintainable, totally ignoring the fact that these petitions were in furtherance to not only doing justice, but also to see that justice is done, and especially when even the earlier Crl.M.P.No.194 of 2004 to advance the hearing was ordered by the Court,

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just in order to comply with the orders of the High Court, and similarly the said two petitions were filed only to bring about the import of the earlier orders of this Court; that the other reasoning of the Court below are contrary to law and also the facts of the case.

4. During arguments, the learned counsel appearing on behalf of the petitioner would only reiterate what has been pleaded in the above Criminal Revision Case without any new fact or circumstance or law being broughtforth but on the contrary, the learned counsel for the respondents would cite two Judgments in support of the case of the respondents viz.,

(i) 2000 (6) SCC 195 (K.K.Patel and another vs. State of Gujarat and another) wherein it has been held that,

> "Merely because the appellants did not raise the legal points based on Section 161 of Bombay Police Act before the Metropolitan Magistrate, they are not estopped from canvassing on that additional ground also before the Sessions Court in revision as they were challenging therein the very issuance of process against them. The position may be different if the Sessions Judge had avoided dealing with the contention based on Section 161(1) of the said Act on the premise that it could be raised before the trial Court. But when the Sessions Judge had opted to go into that question and rendered a decision on it on merits it is difficult to concur with the reasoning of the High Court that the said aspect would not be gone into by the High Court as the same was not raised before the trial Court."

(ii) In the second judgment reported in 2003 (3) CTC 291 (State, represented by Additional Superintendent of Police, CB CID, Metro Wing, Chennai -2 vs. Tmt.Indirakumari and others) the learned Single Judge of this Court citing the decision of the Honourable Apex Court made in Shailendra Kumar v. State of Bihar and Others, 2002 SCC (Crl) 230 wherein it has been held that,

> "Section 311 empowers the Court to summon material witnesses though not summoned as witnesses and to examine or recall and re-examine if their evidence appears to it to be essential to the just decision of the case...
> 11. Bare reading of the aforesaid section reveals that it is of a very wide amplitude

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and if there is any negligence, laches or mistakes by not examining material witnesses, the Court's function to render just decision by examining such witnesses at any stage is not, in any way, impaired..."

and further held that-

"It is clear from the above decisions that the power is in the widest term exercisable at any stage so long as the Court is in seisin of the proceeding. It is also clear that the said power can be exercised even if there is any negligence, laches or mistakes by not examining material witnesses. Till order/judgment is pronounced, the parties to the proceedings are entitled to invoke Section 311, Cr.P.C. In the present case, there is no dispute that proceeding is still pending with the Special Court. No doubt, the learned Public Prosecutor, after concluding his argument and at the stage of hearing the arguments of the defence counsel, has filed two applications seeking permission to examine and re-examine certain witnesses in support of their claim. In the light of the factual position and in view of the language couched in Section 311, Cr.P.C., as interpreted by the Supreme Court, I hold that Crl.M.Ps.526 and 527/2003 filed by the prosecution before the trail Court under Section 311 Cr.P.C. are maintainable. I shall consider later whether there is any merit in those petitions."

5. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both what could be gathered from the facts and circumstances of the case is that the petitioner herein has filed a complaint against the respondents under Sec.200Cr.P.C. for the commission of the offence punishable under Section 494 of the IPC praying to enquire into the matter and punish the accused with maximum punishment permissible in law.

6. In the said complaint, the petitioner has cited five witnesses and at a stage, the Court on a memo filed by the accused stating that the complainant filed a revision petition in the Madras High Court in Crl.R.C.No.784 of 2003 challenging the orders of the Court in CMP No.1136 of 2002 allowing the respondents to have the admitted signature of PW.2 and be verified by a handwriting expert to show that PW.2 was staying in a Hotel at Anand Regency that was on the day she claims to have witnessed the bigamous marriage of the accused in the above case; further, closing the

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revision case ultimately, since Ex-C1 bears the admitted signature of PW.2, it has to be sent to the Forensic Department for comparison of the same with exemplar signatures and to get opinion and hence would pray to summon PW.2.

7. On the memo filed, the trial Court has passed the impugned order directing PW.2 to be present before the Court on 5.8.2004 as per its order dated 1.7.2004.

8. A cursory glance made into the order impugned would reveal that the lower Court has ordered PW.2 named in the complaint to be present before the Court on 5.8.2004 which has now become infructuous since we are in December 2004 and therefore, technically the order cannot be sustained and further more, it is the case that has been filed on a private complaint by the petitioner/complainant and onus of proof being heavily on the petitioner neither the order requiring to compare the signature of the complainant's witness by the accused need be passed nor is it incumbent on the part of the lower Court to require PW.2 to submit herself for the comparison of her signature in Ex.P.1 and also which bears her admitted signature with that of the exemplar signature for comparison, which is too much an exercise that could be undertaken at the behest of the accused since the facts of the case have to be established primarily based on the evidence let in by the prosecution or complainant and therefore, since the burden of the prosecution is to prove the case put up by it beyond reasonable doubt, it is upto the prosecution to establish the case put up by it and the respondents could only demolish the case based on those documents marked and oral evidence adduced and it is far-fetched and unnecessary on the part of the accused to summon the witnesses of the prosecution. Therefore, the lower Court should not have ordered in the manner in which it has ordered in the order impugned requiring PW.2 to submit to the test of identification of her signature, which is not at all warranted in the circumstances of the case. After all, it is upto the complainant to prove her case, lest the case of the complainant should be thrown off and therefore, there is nothing on the part of the accused to establish the case so as to indulge in all these exercises or summoning the prosecution witness which is too much and not required in the facts and circumstances of the case and hence the following order:

In result,

(i) the above Criminal Revision Case succeeds and the same is allowed;

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(ii) the order dated 1.7.2004 made in C.C. No.8219 of 2001 by the X Metropolitan Magistrate, Egmore, Chennai is set aside;

(iii) consequently, Crl.M.P.No.9417 of 2004 is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

asvm

To
1. The X Metropolitan Magistrate,
Egmore, Chennai.

2. -do- through the Chief Metropolitan Magistrate,
Egmore.

+ 2 Ccs to Mr.N.D.Bahety, Advocate SR NO 56667

+ 1 CC to M/s.Surana & Surana Advocate SR NO 57031

Crl.R.C.No.1513 of 2004
and
Crl.M.P. No.9417 of 2004
22.12.2004

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